Specialty Sands, Inc. ***and*** **Richard W. Strange** ***and*** **Allan A. Bewalda.** Cases 7–CA–42928(1) and 7–CA–42928(2**)**

April 4, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On January 12, 2001, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Specialty Sands, Inc., Nunica, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Richard F. Czubaj, Esq., for the General Counsel.
John D. Meyer, Esq. (R.T. Blankenship & Associates), of Greenwood, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me on September 28, 2000, in Grand Rapids, Michigan, pursuant to charges filed on April 3, 2000, by Richard W. Strange and Allan A. Bewalda, respectively, against Respondent Specialty Sands, Inc. (Specialty) and a consolidated complaint issued on June 6, 2000, and amended on September 28, 2000. The complaint in its final form alleges that Specialty violated Section 8(a)(1) of the National Labor Relations Act (the Act), about February 24, 2000, by refusing to recall employees Strange and Bewalda from a seasonal layoff because they had concertedly requested improvements in their terms and conditions of employment.

On the basis of the record as a whole, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel (the General Counsel) and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Specialty is a corporation with an office and place of business in Nunica, Michigan, where it is engaged in the extraction, washing, sizing, and nonretail sale of materials used in the cast metals industry. During calendar year 1999, in conducting these business operations, Specialty sold goods valued in excess of $50,000 to Construction Aggregates Corporation of Michigan (CACM), located in Michigan, which annually sells and ships goods valued in excess of $50,000 to customers located outside Michigan. I find that, as Specialty admits, it is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Specialty is one of a group of six sister corporations which produce processed granular material ultimately used in foundries in the production of cast iron. The control of these six companies is vested in a Florida holding company, Cheyenne Sands. Specialty operates two mining sites—one called Clark Farm and the other (the site immediately involved in the instant case) in Nunica, Michigan. The product from the Nunica site is trucked to one of two Michigan sites, operated respectively by two of Specialty's sister corporations—CACM and Standard Sands (Standard). For reasons related to weather, Specialty ceases operations about November of each year, and does not resume operations until April or late March of the following year.

B. Events During the 1999 Season

During the 1999 season, four Specialty employees worked at the Nunica site. About mid-July 1999 Nunica employee Bewalda, who had worked for Specialty during every season since about 1987 was absent from work for 3 days because of a death in his family. When he found out that he was not going to be paid for those 3 days, he went to the office of personnel manager, Vicki Coulson, and demanded a copy of a union contract which was in effect at another facility controlled (like Specialty) by Cheyenne Sands. After she refused to give him a copy, the two of them went into the office of Howard Chapman, admittedly Specialty's agent, who is the general manager of Cheyenne Sands and of all of its subsidiaries including Specialty. Chapman upheld Coulson's decision not to allow any-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts to the judge's finding in sec. II,G,5 of her decision concerning employee "Bewalda's March 23 request to be returned to work." While we agree that Bewalda did not specifically make such a request during his conversation with the Respondent's general manager, Chapman, on March 23, 2000, Bewalda's credited testimony reveals that he "displayed interest in being recalled" to his former job when he met with Chapman that day, as found by the judge in sec. II,G,3 of her decision.

[2] In light of the judge's finding, with which we agree, that Respondent's actions were not in fact motivated by the exigencies of its business operations, we find it unnecessary to rely on the judge's discussion, in sec. II,G,5 of her decision, of *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228–229 (1963), and its purported application to the instant case.

one who was not covered by the contract to obtain a copy. Bewalda said that "things needed to be put in writing." Chapman agreed to do this, and asked Bewalda what he was concerned with. Bewalda named vacations, holidays, and bereavement pay. Chapman thereafter prepared, and distributed to all of Specialty's employees who were working at the Nunica facility, a document dated July 23, 1999, which (he testified) set forth Specialty's existing policies with respect to these matters. This document began with the following language:

> It has been brought to the attention of this office that there exists a need for certain Company policies to be memorialized so as to, among other things, eliminate confusion and preferential practices in the future.
>
> All policy enactment in the past was undertaken in a spirit of evenhandedness and absent the perceived necessity of committing specific procedures to the written word. Such is no longer the case.
>
> The following principles shall be applicable henceforth.
>
> . . . .
>
> II HOLIDAYS
>
> Any of the following holidays that fall during the operating season [followed by a list of 9 holidays beginning with New Year's Day and ending with Christmas Day, including about 6 holidays which fall during Specialty's normal operating season].

The document does not state in terms that any holidays will be paid holidays; see infra fn. 3.

Bewalda's deceased relative did not fall within the group for whose death this document called for bereavement pay, and he did not receive it.

About July 27 Nunica employee Strange telephoned Chapman and asked him to meet with Specialty's employees to discuss "benefits and so forth." In early August Chapman came to the Nunica site and met with the four Specialty employees who worked there—Bewalda, Strange, Jon Meyer (no kin to Specialty's trial counsel), and Eric Bowers. The employees complained about a defective front loader; Chapman replied that Specialty was having trouble obtaining a replacement part but it was on order. The employees also complained about the absence of a catwalk which for 2 years they had been vainly requesting for safety reasons; Chapman said that this was "in the works." The catwalk was erected on an undisclosed date after November 1999 and before (probably) late February 2000; the missing part was installed in the front loader on an undisclosed date which likely preceded late February 2000. Bewalda expressed a desire for dental insurance, to which Chapman replied that the employees would never have that. In addition, the employees asked for an increase in their IRA and in nightshift premiums and about holidays. As to these matters, Chapman said that in the area of costs and prices, there would not be any raises or increases until April 1. He said that he did not think there would be any trouble with the shift premiums, and as to the other matters, he would get back to them.[3]

The employees who were working at the Nunica facility were laid off for the 1999 season in late December 1999.[4]

C. The Employees' February 2000 Letter to General Manager Chapman

Specialty's employees decided in early November 1999 that if Chapman did not get back with them about the matters discussed at the early August 1999 meeting, they would get together and draft and send him a letter. Chapman did not get back to the employees. As to why he did not do so, Chapman testified that the employees' nonmonetary concerns had been dealt with; and as to their monetary concerns, the employees knew about Specialty's practice of making monetary changes known on April 1 (a date after Specialty normally resumed operations), after which no monetary changes would be announced or made until the following April 1. Chapman testified that Specialty follows this policy in order to make it easier to analyze the entire workforce of Cheyenne Sand's subsidiaries at the end of the fiscal year.

In early February 2000 while the Nunica employees were on seasonal layoff, a conference was conducted among Strange, Bewalda, and employee Dan Haynes, who was in Specialty's employ but, for several years had been working throughout the year at Standard (one of Specialty's sister corporations). Meyer did not participate in the meeting because the participants had found it difficult to get hold of him; and they made no effort to call Bowers because he had taken a different job. After drawing up a couple of drafts these three employees prepared the following letter to Chapman, dated February 21, 2000 (emphasis in original):

> We at Specialty Sand, Inc. want to express to you some real concerns we have with the direction we seem to be headed. These issues are explained in detail below:
>
> In January we received our IRA or pension checks. Why does the amount remain at $2,000.00? The cap should be raised to at least $2,500.00. We are currently in the year 2000. If you look at what we have gained since 1993 when the amount was $1,500.00, to $2,000.00 in 1994, you can see for yourself, there had been *no* gain. Also, why was FICA discontinued on these checks? Because of this change, we are not receiving the $2,000.00, but are being penalized [see infra fn. 7].
>
> Holiday pay. The union receives pay for nine holidays. We believe that upon start up in the spring, we

[3] My finding in this sentence is based on credible parts of the testimony of Strange, Bewalda, and Chapman. Chapman testified to having said that he would get back to them, and further testified that although he intended to do so on April 1, he did not give them a date.

[4] Bewalda's active employment in 1999 ended before December 1999 because (in accordance with his usual custom) he took advantage of a hunting season which began before the date when the others were laid off. No contention is made that this affected any recall rights he would otherwise have had.

would like to receive pay for all holidays during the year we are not paid for, same as the Union.[5]

Night shift pay should be least an additional $.35.

We would like a response to these issues, explaining what can be done to correct these deficient areas, by mail or individually. Also, any changes should be in writing, addressed, and given to each employee. It will be very much appreciated if you would respond by March 20, 2000.

Wishing to thank you in advance for your time, we remain.

Sincerely,

At the bottom of this letter were typed the names of Bewalda, Haynes, Meyer, and Strange, with spaces calling for their respective signatures. Bewalda, Haynes, and Strange signed it in each other's presence. Bewalda and Strange testified that the employees selected March 20 as the date that they wanted a response from Chapman, because April 1 was always the cutoff date for pay raises and they wanted an opportunity to discuss the matter with him before any change was made. Meyer did not sign the letter; he testified that he did not sign it because:

> I did not like the wording . . . The first part of the letter questioned the leadership of the Company. I didn't have a problem with the leadership. The money amounts and they were asked it sounded more like a demand than asking for a raise, improvements.

D. The Recall Letters and Their Revocation; General Manager Chapman's Subsequent Contacts With Strange and Bewalda

Specialty employees in the mining operation normally return about the last week in March from their regular seasonal winter layoff. Chapman testified that about the first week of February, he decided to recall the seasonally laid-off employees effective March 20. However, laid-off employee Meyer testified without contradiction that when he telephoned Specialty's General Superintendent Roy Closs about February 19 to find out whether the callback would be earlier than the usual date of the last week in March (because Meyer was planning a trip to North Carolina in that month), Closs merely replied that he thought the callback would be earlier than that and Meyer "should . . . probably adjust accordingly." After Strange and Bewalda had signed and mailed the employees' February 21 letter to Chapman, Closs telephoned them and (pursuant to Chapman's instructions) told them to return to work on March 20.[6] They received these recall messages an unusually long period before their recall date.

Chapman testified that he received the employees' February 21 letter about February 23 or 24, and after they had received their recall dates. By letters to Strange and Bewalda dated February 24, 2000, identical except for the name of the addressee, Chapman stated:

> I have your letter of February 21, 2000.
>
> You have demanded that my communications to you be in writing. This notification is in satisfaction of that demand.
>
> You are directed to disregard the callback date of March 20, 2000.
>
> Further communication, when and if it occurs, will also be in writing per your demands.

The June 23 complaint alleges, and Specialty's answer admits, that in these letters Specialty "refused to recall . . . Strange and . . . Bewalda from a seasonal layoff and it continues to refuse to recall them to this date."

On March 23 Chapman happened to encounter Strange at a convenience store. Strange asked, "When are we going back to work?" Chapman smiled and said, "You're not," that Strange had been replaced. Strange said that he had always done what had been asked of him, and that he had quickly responded to Specialty's needs. Strange mentioned one occasion when, at Chapman's request, Strange had taken a plane to Milwaukee on 45 minutes' notice, and had helped Chapman "a lot" there, "You were in a bind." Chapman said, "I know. I hate to lose a good guy. You're been a good worker." Chapman said that he had no problem with Strange's performance as an employee, but that Chapman could not operate in the cross-hairs of a threat, because he had too many other people whose welfare was at stake (see infra part II F). Strange said, "Threat?" Chapman said, "Yeah, that letter was a threat . . . I had three people look at it, plus a labor attorney, and it was a threat . . . I will not work under it." The two of them then left the store. Chapman started raising his voice and when Strange protested, started to holler at him. At this point Strange walked back to his car.[7]

Also, on March 23 Bewalda and his wife came to Chapman's office. Bewalda said, "I understand I'm not being called back." Chapman said, "That's correct." Bewalda asked, "All because of this letter?" Chapman said yes. He said that too many other people's welfare was involved, that his hands were tied, and that he could do nothing about it. He said that he had met with three or four other people who said that the letter sounded like a threat to him. Bewalda said, "No way." Chapman said, "There's nothing in this letter that tells me you're going to come back. You demand a response in writing. If I respond in writing and don't get a response back, by that time I've lost even more time." Mrs. Bewalda said, "Go ahead. Fire him." Chapman said, "He's not fired. He's laid off."

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[5] This sentence aside, the record fails to show what paid holidays, if any, the Nunica employees were receiving.

[6] My finding that Closs made these calls after the employees had mailed their Monday, February 21 letter, is based on Bewalda's testimony that he received Closs' call about Wednesday of that week, and on the testimony of both employees that they received these calls after mailing the letter. Closs was still Specialty's general superintendent at the time of the hearing, but he did not testify. I infer that as to the date of his telephone calls, he would have corroborated Strange and Bewalda. *Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 174 (1973); *Limestone Apparel Corp.*, 255 NLRB 722, 725 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

[7] My findings in this paragraph are based on a composite of credible parts of Strange's and Chapman's testimony. To the limited extent that their testimony may differ, for demeanor reasons I credit Strange.

On an undisclosed date, Chapman asked Haynes why he had signed the letter. Chapman testified (without objection or limitation) that Haynes replied that he "was told" that "we all had to sign this letter," and that among the issues set forth in the letter, his only problem was that "someone" at the employees' meeting about the letter had told him that "taxes were being illegally . . . or improperly taken." Haynes did not testify. As to what Haynes was in fact told, Strange and Bewalda credibly testified that Haynes was not told that all the employees had to sign the letter because it would not work unless everyone signed it.

E. The Replacement of Strange and Bewalda

Chapman testified that he received the February 21 letter about February 23, and that immediately thereafter he began to look for another dredge operator to replace Bewalda. Initially, over a 2-day period, Specialty called all of the area employers that had occasion to hire operators with dredge experience, and asked if they could recommend or knew of anyone who could operate a dredge. However, all of these employers were themselves looking for dredge operators. Then, in a further effort to obtain a dredge operator, Personnel Manager Coulson went to a job fair. Also, Specialty telephoned a number of persons with some experience around sand and gravel pits, and interviewed several of them. On March 27, 4 days after Chapman in effect rejected dredge operator Bewalda's request for recall, Specialty hired applicant Lynn Kraft, who had recently moved to Muskegon from Oregon and had found Specialty's name in the telephone book, to replace Bewalda as a dredge operator (see Tr. at 95 LL. 2–3). About March 14 Respondent hired applicant Nicholas J. Brown-Hudelson as a plant operator to replace Strange. The record fails to show what relevant job experience, if any, Brown-Hudelson had had before Specialty hired him, or how much training, if any, he received between the time he was hired and the time he began to work as a plant operator.

Ordinarily, Nunica employees resume production, on a two-shift basis, after a week or 2 of preparatory operations. In 2000 Nunica production began on April 18, 4 weeks after the March 20 recall date issued to Bewalda and Strange. Moreover, such production operations began on a one-shift basis, with Meyer as the only employee who performed all the duties of a dredge operator. During undisclosed dates before beginning to work for Specialty, Kraft, whom Specialty hired as dredge operator Bewalda's replacement, had worked in a sand and gravel operation. He worked as a trainee with dredge operator Meyer between March 27 and May 8, at which point Specialty concluded that Kraft was capable of running a full shift by himself and went on to two shifts.

Laying to one side the fact that the jobs for which Kraft and Brown-Hudelson were hired were seasonal jobs, both of these employees were hired as permanent employees. Strange and Bewalda had worked for Specialty for about 11 and about 12 years, respectively. Chapman testified at the September 2000 hearing that both of them were "good workers," but that Chapman had no intention of calling them back to Specialty "because of what transpired in the past," and "as of right now, you can say that they're permanently laid off."

F. General Manager Chapman's Testimonial Explanation for Canceling Strange's and Bewalda's Recall Notices

Chapman testified that he based his decision to rescind the recall notices of Bewalda and Strange on the February 21 letter which they signed and sent to him. He testified that he interpreted this letter as a "veiled threat" that Bewalda and Strange would not report to work on the March 20 recall date, and that "I had a fear that they might not come back based on that letter . . . I had no idea [what they were going to do and] I assumed there was a very high likelihood [that they would not come back]. And I acted accordingly." Chapman testified that he based his interpretation of the letter largely on the fact that the letter requested a response by March 20, Strange's and Bewalda's recall date.[8] Strange and Bewalda both credibly testified that the purpose of the March 20 deadline was to allow Chapman time to discuss monetary matters before the April 1 deadline after which Specialty's financial package was fixed, according to Specialty's practices, for the next 12 months. Chapman further testified that he based his "threat" conclusion partly on the fact that some of the issues set forth in the letter had already been discussed in August 1999 (see supra part IIB). He testimonially characterized an issue which had not been discussed in August—namely, the matter of FICA deductions in connection with the employees' "IRA or pension checks"—as "absolutely squirrely." Chapman testified that he telephoned Cheyenne Sands' Florida office, which issues "year-end IRA's," and asked, "if there was any truth to this—that taxes were being taken out of the amount [the employees] were given, rather than prior to them receiving the amount so that they would net the [$]2000," and that he was told there had been "no change in the procedure."[9]

As previously noted in 2000 Nunica production began 2 or 3 weeks later than usual with respect to the recall date, and operations on a two-shift basis, the normal practice from the outset of production, did not begin until the conclusion of the training of Bewalda's replacement, almost 3 weeks after the delayed start of production. As to the reason for Chapman's at least alleged February 24 "fear" that Bewalda and Strange might not report to work on their March 20 recall date, Chapman testified, in substance, that the customers of the Cheyenne Sands subsidiaries require their products throughout the year; that the unique kind of sand produced during Specialty's seasonal operations is an essential ingredient of product shipped by other Cheyenne Sands subsidiaries to their customers; that Specialty's stockpile of this unique kind of sand had been substantially depleted during the 1999–2000 seasonal shutdown; and that unavailability to other Cheyenne Sands subsidiaries of

[8] As previously noted, the letter had been mailed before Bewalda and Strange had been advised of their recall date. An earlier draft (dated February 15) of this letter had requested a response by March 13. Meyer gave Chapman a copy of this earlier draft in April 2000.

[9] Chapman's rather vague testimony suggests that he interpreted the employees' letter as claiming (inaccurately, according to his information from Cheyenne Sands' Florida office) that Specialty had recently started to deduct FICA taxes from payments into the employees' IRA accounts before making these payments. Whether he correctly interpreted this portion of the letter is immaterial to this proceeding. So far as the record shows, he never discussed this matter with the employees.

Specialty's unique kind of sand would cause the subsidiaries to lose a lot of business and might cause them to lose what had previously been regular customers. As of April 17, 2000, when production for that year began, the Nunica operation had about 7120 tons of product in its stockpile, almost double the number of tons usually in its stockpile upon resumption of operations at the end of the seasonal shutdown, and enough to supply Specialty's sister corporations (its only direct customers) until at least May 4.

Chapman credibly testified that he never asked Bewalda or Strange whether they planned to come back to work, and that Haynes (the remaining signatory to the February 21 letter) did not tell Chapman that Bewalda and Strange did not plan to come back to work. Bewalda and Strange both credibly testified that during the meetings where they discussed the preparation of the February 21 letter to Chapman, they said nothing about not reporting for work; Bewalda credibly testified that this "didn't cross our minds, at least not mine." Strange credibly testified that during these meetings there was no talk about striking. Strange and Bewalda credibly testified that they were not prepared to take any action if Chapman did not respond to the letter. Chapman credibly testified that before he decided not to recall Strange and Bewalda, they had not engaged in any slowdown or a sitdown strike, or any type of misconduct, and that when he decided not to recall them, they did not defy any authority or orders.

G. Analysis and Conclusions

It is well settled that an employer violates Section 8(a)(1) of the Act by taking personnel action against an employee because he has engaged in concerted activity which is protected by Section 7 of the Act.[10] As previously noted, Chapman told Bewalda and Strange that he had rescinded their recall notices, and permanently laid them off, because they had signed the February 21 letter, which asked Chapman to advise the employees what could be done to correct the perceived "deficient areas" of holiday pay, shift premiums, and the gross and net size of the employees' IRA or pension checks. Similarly, Chapman himself testified that it was this letter on which he based his decision not to recall these two employees. Moreover, the employees' action in drafting this letter and mailing it to General Manager Chapman constituted protected concerted activity, at least if the letter is taken at face value. *Liberty Natural Products*, 314 NLRB 630, 637 (1994); *CleanPower, Inc.*, 316 NLRB 496, 497 (1995). However, Specialty contends that the letter contains an "implicit threat" that Bewalda and Strange would not return to work on the recall date if their "demands" were not met; and that, therefore, (1) the signing and mailing of the letter did not constitute activity protected by the Act and/or (2) Specialty justifiably rescinded their recall notices as a "defensive" measure.

As to whether the letter contained such an "implicit threat," I see nothing in the evidence cited in Specialty's brief to cast any doubt on the sincerity of Bewalda's and Strange's credited testimony that even if Chapman did not respond to the February 21 letter, Bewalda and Strange intended to report to work when the 2000 season began. Thus, the evidence shows that the March 20 date by which the letter requested an answer was in no way motivated by the employees' March 20 recall date, of which the employees were not advised until after the letter was mailed. Nor is these employees' credible testimony about their intent undermined by their August 1999 conference with Chapman about some of the issues raised in the February 2000 letter. As Specialty admits, the August 1999 conference had not dealt with tax deductions in connection with the employees' IRA. Furthermore, there is no record evidence that the employees' August 1999 request for shift premiums specified an amount (whereas the February 2000 letter specified 35 cents), there is no clear record evidence that the employees' August 1999 request for an increase in their IRA or pension checks specified an amount (the February 2000 letter requested an increase of "at least" $500),[11] and Respondent's July 23, 1999, bulletin regarding company policies failed to state whether the holidays there described were paid or unpaid. In any event, employees' request for an explanation of "what can be done to correct . . . deficient areas," previously complained about and perceivedly as yet unrectified, does not support the inference that unless the complaining employees received such an explanation they did not intend to return to work. Rather, Strange's and Bewalda's credible testimony, and their March 23 expression to Chapman (after Nunica had resumed operations on March 20 without a response from Chapman to the concerns expressed in the employees' February 21 letter) of their continued interest in returning to work there, preponderantly show that whether or not they received a response they had intended to comply with the recall notices which Specialty rescinded because of their letter.

Specialty may be contending that its rescission of the recall notices was nonetheless lawful because Chapman allegedly entertained an honest belief that the letter threatened that the employees would not return. However, the record preponderantly shows that Chapman did not in fact entertain such a belief. As Specialty does not appear to question, the letter on its face makes no such assertion. Moreover, Chapman by his own admission never asked either Bewalda or Strange whether he intended to return to work on the recall date.[12] Indeed, after the March 20 date had passed and dredge operator Bewalda displayed interest in being recalled, Chapman refused, even though he had not hired even a trainee dredge operator and even though the training of the replacement whom Chapman eventually did hire required Respondent to delay by 6 weeks the initiation of a second shift, which Respondent routinely used whenever the Specialty facility was actually producing.

[10] *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962); *Vic Tanny International, v. NLRB*, 622 F.2d 237 (6th Cir. 1980); *Robbins Engineering*, 311 NLRB 1079, 1083–1084 (1993).

[11] Chapman testified that as to the August 1999 request for an increase in the "retirement benefit money," the employees requested an increase of "I think a thousand dollars. I'm not sure. I'm not sure there was even a number. They just wanted it increased."

[12] He tendered the testimonial explanation that the employees' letter told him to communicate with them in writing, and "I didn't have the time. If I'd written back to them and they'd not responded, I would have lost a week right there." However, the employees' letter requested a reply "by mail or individually," and admittedly, he did not telephone them either.

Rather, I credit Chapman's testimony that the February 21 letter offended him and challenged his authority, and find, contrary to his testimony, that it was this aspect of the letter that caused him to rescind the employees' recall notices.[13] Thus, as to the request in the letter that he get back to the employees by March 20, he testimonially expressed extreme annoyance, on the ground that Specialty had always followed the practice of telling the employees on April 1, after their late March return from seasonal layoff, "what their raises were and what the monetary conditions were" (at which point in time, he testified, Specialty's accounting-based practice rendered the employees' monetary compensation unchangeable until the following April). Furthermore, he rather peevishly testified that almost all of the issues raised in the letter were "old" as to which he and the employees had already had "a long discussion;" the exceptions being the employees' at least allegedly "squirrely" allegations regarding FICA deductions in connection with their IRA accounts and the employees' request, which Specialty at least allegedly could not lawfully grant, for an increase in the employees' "retirement money."

Moreover, Specialty's rescission of the recall notices was unlawful even if in fact motivated by an honest belief that the employees would not honor the recall notices unless Specialty gave a "response" to their letter. Assuming for the moment that such an intention by the employees would have rendered the letter unprotected, Specialty cannot rely on even an honest belief that the employees entertained such an intention in view of the evidence which preponderantly shows that this was not in fact their intention. *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964); *Teledyne Industries v. NLRB*, 911 F.2d 1214, 1222 (6th Cir. 1990); *Pepsi-Cola Co.,* 330 NLRB 474 (2000).[14] In any event, the employees' February 21 letter could not have been rendered unprotected by the failure of even both of these employees (let alone, as to one of them by the failure of the other)[15] to return to work on their recall date. Such action could not reasonably be characterized as misconduct. Indeed, if jointly engaged in, it might in itself constitute concerted activity protected by Section 7 of the Act and, therefore, conduct whose anticipation cannot serve as a lawful motive for excluding employees from the employment relationship; see *NLRB v. Town & Country Electric,* 516 U.S. 85 (1995).

Specialty principally defends its rescission of Bewalda's and Strange's recall notices on the ground that when resuming operations for the season, Specialty needed to start production as soon as and at the highest rate possible in order to provide sand to its sister Cheyenne Sands companies, which in turn provide raw materials to customers whose need therefor is yearround and not seasonal. This contention is wholly irrelevant to Specialty's conduct in rescinding Bewalda's and Strange's recall even before starting to look for replacements. This contention is also wholly irrelevant to Specialty's conduct in refusing dredge operator Bewalda's own at least tacit recall request (3 days after his rescinded recall date) before hiring job applicant Kraft as a trainee to replace the experienced Bewalda. Moreover, even where motivated solely by such business exigencies, conduct otherwise unlawful (here, because motivated by the employees' Section 7—protected letter) is not automatically excused; rather, a determination as to whether such conduct is nonetheless an unfair labor practice requires "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and . . . balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228–229 (1963). In the instant case, Specialty claimed "business ends" were disadvantaged by its action, immediately after receiving the employees' Section 7-protected letter, in rescinding the signatories' recalls without so much as asking them whether they intended to return if they failed to receive a response. Indeed, if Specialty had even complied with dredge operator Bewalda's March 23 request to be returned to work after Chapman had failed to respond to the concerns expressed in the February 21 letter, and before Specialty had hired a trainee dredge operator as a replacement, Specialty would have been able to begin production operations on a two-shift basis about the usual date in late March, without a 3-week delay in starting production, and an additional 3-week delay in beginning two-shift operations, owing to the need to train the new dredge operator. Furthermore, Specialty does not claim that it anticipated or experienced any particular difficulty in obtaining on short notice an immediately productive plant operator to replace Strange. For these reasons, the intended consequences of Bewalda's and Strange's termination upon employees' rights outweigh the business ends allegedly served by Specialty's conduct.

Specialty counsel's opening statement at the hearing suggested that Specialty's February 24 action was analogous to a lawful "defensive lockout"—presumably "defensive" against the problems which would have been created if Bewalda and Strange had in fact failed to report to work on March 20. However, during a "defensive" lockout, the employer is privileged to hire only temporary replacements, and may not lawfully hire permanent replacements. See *Harter Equipment,* 293 NLRB

[13] Chapman testified that at least part of the reason why no termination letter had been sent to the third letter-signer, Haynes, who for several years had been working year-round at Standard's premises, was that he had never made any of the complaints set forth in the letter.

[14] Specialty's brief points to Justice Harlan's separate *Burnup & Sims* opinion, dissenting in part from the majority, that "it is hardly fair that the employer should be faced with the choice of risking damage to his business or incurring a penalty for taking honest action to thwart it. [The proper rule] would require reinstatement of the mistakenly discharged employee and backpay only as of the time that the employer learned, or should have learned of his mistake, subject, however, to a valid business reason for refusing reinstatement," such as "if a replacement had been hired and the employee unduly delayed in apprising the employer of the mistake" (379 U.S. at 24). However, even the approach advocated by Justice Harlan's dissent does not advance Specialty's cause. Thus, Specialty affirmatively learned on March 23 that the employees had intended to return on their March 20 recall date; as of March 23 no replacement for Bewalda had been hired; until March 23 Specialty had never (so far as the record shows) told either employee that it feared they would not return on the recall date; Strange was never so advised, so far as the record shows; and the employees were never asked whether they would return.

[15] *Garment Workers Union v. NLRB*, 237 F.2d 545, 550–552 (D.C. Cir. 1956).

647 (1989); *Georgia-Pacific Corp.*, 281 NLRB 1 (1986); *Central Illinois Public Service Co.,* 326 NLRB 928 (1998), affd. 215 F.3d 11 (D.C. Cir. 2000), cert. denied 531 U.S. 1051 sub nom. *Electrical Workers Local* 702 (2000). Chapman testified that the employees hired for Bewalda's and Strange's jobs were permanent replacements.

For the foregoing reasons, I find that Specialty violated Section 8(a)(1) of the Act on February 21, 2000, by refusing to recall employees Bewalda and Strange after a seasonal layoff.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent has violated Section 8(a)(1) of the Act on February 24, 2000, by refusing to recall employees Richard W. Strange and Allan A. Bewalda after a seasonal layoff.

3. The unfair labor practice set forth in Conclusion of Law 2 affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be ordered to cease and desist from such conduct, and like or related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act.

Respondent will be required to offer employees Richard W. Strange and Allan A. Bewalda reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions. Also, Respondent will be required to make them whole for any loss of earnings and other benefits they may have suffered by reason of Respondent's refusal to recall them, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). In addition, Respondent will be required to expunge from its records all references to these employees' unlawful termination, and to notify them in writing that this has been done and that the actions and matters reflected in these documents will not be used against them in any way.

Also, Respondent will be required to post appropriate notices during a period when Specialty's production operations, which are seasonal in nature, are actually being carried on by employees. At the time of the hearing, employee Haynes, who signed the Section 7-protected letter which caused Specialty to terminate the two other signatories, was still on Specialty's payroll but for several years had been working at the premises of Standard Sand, a sister corporation. It is obviously appropriate that he be apprised of the contents of the notice. Accordingly, if during the posting period Haynes is still in Specialty's employ but performs his duties on premises not occupied by Specialty, a copy of the notice is to be mailed to him.

On the basis of these findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended Order[16]

ORDER

The Respondent Specialty Sands, Inc., Nunica, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recall employees from a seasonal layoff because they have engaged in activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Richard W. Strange and Allan A. Bewalda, within 14 days of the date of this Order, full reinstatement to their former positions or, if such positions no longer exist, substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make Richard W. Strange and Allan A. Bewalda whole for any loss of earnings and other benefits they may have suffered as a result of Respondent's refusal to recall them in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files all references to the unlawful refusal to recall Richard W. Strange and Allan A. Bewalda, and within 3 days thereafter, notify such employees that this has been done and that the actions and matters reflected in these documents will not be held against them in any way.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by Region 7, post at its facility in Nunica, Michigan, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained while production operations are being carried on for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to current employees and former employees employed by the Respondent at its Nunica

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

facility at any time since February 24, 2000. If, during the posting period employee Dan Haynes is still employed by Respondent but is not working on its premises, Respondent shall also, at its own expense, duplicate a copy of the notice and mail it to him.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected con certed activities.

WE WILL NOT refuse to recall you from a seasonal layoff because you have engaged in conduct protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL, within 14 days of the date of the Board's order, offer Richard W. Strange and Allan A. Bewalda reinstatement to their former positions or, if such positions no longer exist, substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make Richard W. Strange and Allan A. Bewalda whole, with interest, for any loss of earnings and other benefits suffered as a result of the February 24, 2000 rescission of their recall notices.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to our unlawful refusal to recall Richard W. Strange and Allan A. Bewalda, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the action and matters reflected in these documents will not be held against them in any way.

SPECIALTY SANDS, INC.